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# TWAIL and the Dabhol Arbitration

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## TWAIL and the Dabhol Arbitration

Gus Van Harten

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## TWAIL AND THE DABHOL ARBITRATION

Gus Van Harten\*

*The article draws on the theoretical perspective of Third World Approaches to International Law (TWAIL) to review a case study in international investment arbitration. The case study is an International Chamber of Commerce arbitration arising from controversies over the Dabhol project in India. Three points are made about the arbitration. First, it demonstrates how investment contract arbitrators may approach their role as going beyond the usual remit of commercial arbitration rooted in an autonomous agreement between the contracting parties; in this case, the arbitration was recast as a mechanism for wide-ranging review of government policies and court decisions associated with Third World interests. Second, the arbitration offers reasons to suspect regime bias, as discussed in the TWAIL literature, based on the institutional make-up of the tribunal and the content of its award. Third, the arbitration formed part of a wider conflict between Western and Third World interests that implicated courts and tribunals in the U.S., the U.K., and India. With respect to TWAIL itself, it is suggested that the perspective provides a useful reference for organizing critique but is less relevant to the identification of specific options for reform in international arbitration or strategies to encourage, manage, or regulate investment for social ends. In this respect, TWAIL might benefit from incorporation of more applied and technical study alongside its guiding principles and framework for critique.*

### I. Introduction

This article draws on the theoretical perspective of Third World Approaches to International Law (TWAIL) in order to review a case study in international investment arbitration.<sup>1</sup> The subject of the case study is an International Chamber of Commerce arbitration (the ICC Arbitration) that arose from controversies surrounding the Dabhol project in India.<sup>2</sup> The Dabhol project was a power generation project launched by Enron Corporation in the 1990s in the state of Maharashtra. As it progressed, the project engaged various actors, including U.S. firms, U.S. government agencies, and governments – as well as non-state actors, social movements, and other constituencies – in India. Disputes arising from the project led to proceedings in various courts and tribunals in different jurisdictions, including the ICC Arbitration located in New York.

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<sup>1</sup> The TWAIL perspective is approached on its own terms, that is, it is used as a basis for review and not subjected to close scrutiny for its claims and assumptions. The author is grateful to the editors for their invitation to contribute to this special issue and acknowledges the helpful comments of an anonymous peer reviewer and the editorial committee. All errors or omissions are my own.

<sup>2</sup> The primary source of information about this arbitration is the text of the tribunal's award. See *Capital India Power Mauritius I and Energy Enterprises (Mauritius) Company v. Maharashtra Power Development Corporation Limited, Maharashtra State Electricity Board, and the State of Maharashtra*, Int'l Comm. Arb. Case No. 12913/MS (27 April 2005), available at: [http://ita.law.uvic.ca/documents/Dabhol\\_award\\_050305.pdf](http://ita.law.uvic.ca/documents/Dabhol_award_050305.pdf) (last accessed 15 July 2011) (hereinafter ICC Arbitration award).

Drawing on TWAIL, three points are made in this article about the ICC Arbitration. The first is that the case demonstrates how international investment arbitrators – in this case, acting under a contract<sup>3</sup> – may approach their role as going beyond the usual remit of a commercial arbitration rooted in an autonomous agreement between the contracting parties. In the present case, the arbitration was recast by the arbitrators as a mechanism for wide-ranging review of government policies and court decisions that are associated with Third World interests. A second point is that the ICC Arbitration provides reasons to suspect regime bias, as described by Gathii,<sup>4</sup> in international arbitration based on the institutional make-up of the tribunal and the content of its award. The third point is that the ICC Arbitration constituted part of a wider conflict between Western and Third World interests that implicated courts and tribunals in the U.S., the U.K., and India before it was resolved in 2005 by an agreement involving U.S. firms, the U.S. government, and various Indian governments.<sup>5</sup>

In conclusion, a brief comment is offered on TWAIL in light of the discussion of the case study. It is suggested that TWAIL provides a useful reference for organizing critique of international arbitration. However, TWAIL appears less relevant, beyond as a source of general norms, for the identification of options for reform in international arbitration or of strategies to encourage, manage, or regulate investment for social ends. In this respect, TWAIL might benefit from the incorporation of more applied and technical analysis alongside its guiding principles and framework for critique.

The article is preliminary in that it does not provide a thorough study of theory and instead examines a single case study. The aim is to offer tentative insights on aspects of TWAIL and the case study, each informed by a review of the other, and not to evaluate wider aspects of the Dabhol project or international arbitration. The methodology comprised a review of academic literature on TWAIL, of secondary sources on the Dabhol project, and of the ICC Arbitration award. Information on the Dabhol project was collected from secondary literature including U.S. law journal articles as well as the Indian publication *Economic & Political Weekly*. The primary basis for evaluation of the case study was the text of the award issued in April 2005 by the ICC Arbitration tribunal, which was established under one of the legal agreements underlying the Dabhol project.<sup>6</sup> Notably, this is one of an apparently small number of ICC arbitration awards that are publicly available and the only award in an investment arbitration against India that is publicly available, to the author's knowledge.<sup>7</sup>

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<sup>3</sup> International investment arbitration refers here to any compulsory arbitration between a foreign investor and a host state or state entity, whether authorized by a contract, domestic statute, or treaty. The present case involves a contract-based international investment arbitration (or investment contract arbitration) in that it arose from an arbitration clause in an agreement between foreign investors and a state entity. GUS VAN HARTEN, *INVESTMENT TREATY ARBITRATION AND PUBLIC LAW*, Ch. 3 (Oxford University Press 2007).

<sup>4</sup> James Thuo Gathii, *Third World Approaches to International Economic Governance* (hereinafter Gathii), in *INTERNATIONAL LAW AND THE THIRD WORLD: RESHAPING JUSTICE* (Richard Falk, Jacqueline Stevens, & Balakrishnan Rajagopal eds., Routledge 2008) (hereinafter Falk, Stevens & Rajagopal eds.).

<sup>5</sup> Ronald J. Bettauer, *India and International Arbitration: The Dabhol Experience*, 41 GEO. WASH. INT'L L. REV. 381, 383-385 (2010) (hereinafter Bettauer).

<sup>6</sup> See ICC Arbitration award, *supra* note 2.

<sup>7</sup> The award was available from the Investment Treaty Arbitration website, *supra* note 2. This website is an open access repository for awards in investment treaty arbitration and has also posted awards in investment

## II. A Summary of the TWAIL Approach

Authors identifying with TWAIL tend to offer a critical, pluralist, and reformist perspective on international law and international institutions. The unifying theme is acceptance that international law disadvantages countries that were subjected to colonialism and benefits narrow elites, based especially in the West.<sup>8</sup> The approach has in-built tensions in that it distinguishes groups of countries based on their historical encounters with international law via colonialism, but seeks to account for differences among countries (and other actors<sup>9</sup>) included in the category of “Third World”. Likewise, the TWAIL approach is “fundamentally oppositional” to international law and international institutions,<sup>10</sup> but aspires to a program aimed at eradicating social ills.<sup>11</sup> In these respects, TWAIL confronts tensions between universality and pluralism, rejection and reform, and the use of law to advance elite interests and its use to respond to social problems such as poverty, racism, and corruption.

Matua identified three objectives of TWAIL. These were, in summary, the critical assessment of international law, the construction of alternative norms, and the eradication of conditions of underdevelopment.<sup>12</sup> Matua framed the Western orientation to the Third World in terms of the metaphor of savages-victim-saviour, focusing especially on the human rights movement.<sup>13</sup> This reflects wider scepticism in TWAIL of concepts of human rights and good governance.<sup>14</sup> It also

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arbitrations under contracts and domestic legislation. As of 29 April 2011, there were four ICC arbitration cases that had at least one award available on the website. The ICC reported an average of 69 arbitrations per year involving a state or state entity during 2005-2009. International Chamber of Commerce, *ICC International Court of Arbitration Bulletin*, Vol. 16-21. The ICC publishes selected extracts from awards in some cases, but does not make public the full award in any ICC case.

<sup>8</sup> Richard Falk, Jacqueline Stevens & Balakrishnan Rajagopal, *Introduction*, in Falk, Stevens & Rajagopal eds., *supra* note 4, at 5-6 (hereinafter Falk, Stevens & Rajagopal – *Introduction*) (“international law has too often been the province of the strong, and unfriendly to practices associated with the rule of law and justice”); Vijayashri Sripathi, *The United Nation’s Role in Post-Conflict Constitution-Making Processes: TWAIL Insights* 10 INT’L COMMUNITY L. REV. 411, 416 (2008) (TWAIL “assails the creation and perpetuation of international law as a ‘racialized hierarchy’ of international norms and institutions that subordinate the third world by the first world”).

<sup>9</sup> See, e.g., Upendra Baxi, *What may the “Third World” Expect from International Law?*, in Falk, Stevens & Rajagopal eds., *supra* note 4, at 17 (invoking “resilient normative expectations” exemplified by the women’s rights, anti-torture, human rights and forgotten peoples, social and economic rights, and sustainable development movement).

<sup>10</sup> Makau Matua, *What Is TWAIL?*, 94 AM. SOC’Y INT’L L. PROC. 31 (2000) (hereinafter Matua).

<sup>11</sup> Balakrishnan Rajagopal, *Counter-hegemonic International Law: Rethinking Human Rights and Development as a Third World Strategy*, in Falk, Stevens & Rajagopal eds., *supra* note 4, at 64 (hereinafter Rajagopal) (referring to the need in TWAIL to reconsider past tactics and goals in order to imagine “a co-existence of counter-hegemonic international law alongside hegemonic international law”); Obiora Chinedu Okafor, *Poverty, Agency and Resistance in the Future of International Law*, in Falk, Stevens & Rajagopal eds., *supra* note 4, at 98.

<sup>12</sup> See Matua, *supra* note 10, at 31.

<sup>13</sup> Makau Matua, *Savages, Victims and Saviours: The Metaphor of Human Rights*, 42 HARV. INT’L L.J. 201 (2001).

<sup>14</sup> Antony Anghie, *The Evolution of International Law: Colonial and Postcolonial Realities*, in Falk, Stevens & Rajagopal eds., *supra* note 4, at 45 (hereinafter Anghie) (“Human rights law was controversial, however, precisely because it legitimized the intrusion of international law in the internal affairs of a state”; “The virtues of good governance are apparently self-evident. But the meaning of the terms remains open and contestable

reflects also the view that international law, at times, denigrates Third World actors as backward “others” relative to a rational and coherent Western mindset.<sup>15</sup>

The TWAIL approach was explored in a collection of papers published in the *Third World Quarterly* in 2006.<sup>16</sup> The collection reflects diverse perspective on topics ranging from the colonial history of international law<sup>17</sup> to refugee law and torture<sup>18</sup> to international water law and policy.<sup>19</sup> For present purposes, besides the importance of colonialism to international law,<sup>20</sup> two main points were drawn from this collection. The first is that the Third World is a varied and evolving concept due to divergences among countries and the inclusion of non-state actors within the concept of Third World interests.<sup>21</sup> Also, the concept is varied and evolving because it includes concerns about the threats posed to Third World interests, not only by Western states, but also by major firms in important industries or areas of policy, such as water.<sup>22</sup> Linked to this is the second point that the notion of the Third World once offered a coherent basis for political alternatives, such as in the case of the Non-Aligned Movement or the G-77.<sup>23</sup> Today, in the absence of similarly active groupings, TWAIL literature combines lamentation for past defeats with calls for new reforms that support Third World interests.<sup>24</sup>

An important source for the present study was an article by Gathii in the above collection.<sup>25</sup> In the article, Gathii elaborated on the concept of regime bias as an aspect of TWAIL. The concept was compared to the approaches of National Economic Control (exemplified by the Calvo doctrine) and New International Economic Order (exemplified by General Assembly Resolutions, especially the Charter of Economic Rights and Duties of States).<sup>26</sup> In contrast to these other approaches – which provide external critiques of, or alternatives to, international rules – the idea of regime bias examines the internal processes by which international law is

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and these institutions [the IMF and the World Bank] attempted to use an amended version of human rights law to further their neoliberal policies in the guise of ‘good governance’, rather than enabling real empowerment of Third World citizens.”); Rajagopal, *supra* note 11, at 64-66.

<sup>15</sup> See Anghie, *supra* note 14, at 42; Ikechi Mgbefo, *The Civilised Self and the Barbaric Other: Imperial Delusions of Order and the Challenges of Human Security*, in Falk, Stevens & Rajagopal eds., *supra* note 4, at 152-153; Matua, *supra* note 10, at 33.

<sup>16</sup> 27(5) *THIRD WORLD Q.* (2006).

<sup>17</sup> Anghie, *supra* note 14.

<sup>18</sup> Wadie E. Said, *Political Asylum and Torture: A Comparative Analysis*, in Falk, Stevens & Rajagopal eds., *supra* note 4.

<sup>19</sup> Hilal Elver, *International Environmental Law, Water and the Future*, in Falk, Stevens & Rajagopal eds., *supra* note 4 (hereinafter Elver).

<sup>20</sup> Falk, Stevens & Rajagopal – *Introduction*, *supra* note 8, at 3.

<sup>21</sup> Falk, Stevens, and Rajagopal – *Introduction*, *supra* note 8, at 3-4; Rajagopal, *supra* note 11, at 63.

<sup>22</sup> Elver, *supra* note 19, at 190-192 (reporting that two French water companies held nearly 40% of the existing water market share, providing water related services for over 110 million people each).

<sup>23</sup> Falk, Stevens & Rajagopal – *Introduction*, *supra* note 8, at 2; Rajagopal, *supra* note 11, at 63 (reporting that Third World coalitions like the Non-Aligned Movement, the G-77, and others have lost almost all geopolitical relevance).

<sup>24</sup> Rajagopal, *supra* note 11, at 77.

<sup>25</sup> Gathii, *supra* note 4.

<sup>26</sup> *Id.* at 255-9.

interpreted and applied in decisions affecting the Third World. Thus, it envisions some in-built bias in the processes of international administration and adjudication.<sup>27</sup> According to Gathii:<sup>28</sup>

[B]ias is traced in the way in which rules of international trade, commerce and investment are crafted, applied and adjudicated between Third World and developed countries or between Third World countries and the interests of international capital. Regime bias therefore refers to examining the choices made between alternative ways of crafting legal rules, the meanings ascribed to a particular rule in its application by an administrative agency or at the adjudication stage by domestic judicial body or an international tribunal.

This regime bias approach in TWAIL is used below in the review of the structure, process and reasons for the award in the ICC Arbitration. More broadly, from these sources on TWAIL, the following elements may be distilled:

- International law is not a neutral and objective set of rules but an instrument employed in a context of power relations among Western and Third World states as well as other actors;
- International law reflects an underlying racism against countries that were colonized and that remain “others” in international society;
- International institutions may interpret and apply international law in ways that are biased systemically against Third World interests; and
- An important aim of international legal scholarship is to go beyond criticism of international institutions by elaborating ways to reform international law and eradicate social ills.

The remainder of this article draws on these elements, explicitly or implicitly, to review the Dabhol case. In particular, the ICC Arbitration is examined for its engagement with Third World interests (assuming based on TWAIL that India qualifies as a Third World state), its possible reflection of regime bias, and its relationship to apparent conflicts between Western and Third World interests. In the conclusion, TWAIL is revisited in a brief discussion of what the perspective contributed to this study and how it might be oriented toward a more specific program of reform.

### III. Overview of the Dabhol Project

The Dabhol project was a major power project involving the construction of natural gas-fired electricity plants, 250 km south of Mumbai in Maharashtra, India.<sup>29</sup> The project was expected to

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<sup>27</sup> *Id.* at 264.

<sup>28</sup> *Id.* at 261-262.

<sup>29</sup> For more detailed histories, see Human Rights Watch, *The Enron Corporation: Corporate Complicity in Human Rights Violations* (1999), available at: <http://www.hrw.org/legacy/reports/1999/enron/> (last accessed 15 July 2011) (hereinafter Human Rights Watch); Preeti Kundra, *Looking Beyond the Dabhol Debacle: Examining its Causes and Understanding its Lessons*, 41 VAND. J. TRANSNAT'L L. 907, 912-923 (2008) (hereinafter Kundra); Kirit S.

cost U.S. \$2.8 billion.<sup>30</sup> It was established following an effort by the Government of India to liberalize and privatize the energy sector, including by encouraging foreign investment.<sup>31</sup> The project was to be the largest foreign investment project in the country and was billed as the largest privately-owned electricity generation plant in the world.<sup>32</sup> It was one of several major energy projects approved by the Indian government in the 1990s.<sup>33</sup>

The Dabhol project was highly controversial in India. It was criticized by academics, trade unions, opposition political parties, non-governmental organizations, and the media on a range of grounds.<sup>34</sup> Criticisms related to the process that led to the project, the substance of the deal, and the social and environmental impact of the investment activities. In terms of its process, the project was criticized for its unusual speed and lack of transparency. The Memorandum of Understanding for the project, between Enron and the Maharashtra State Electricity Board (MSEB), was signed just three days after Enron's first visit to India to review possible locations for the project and its quick decision to set up the project at Dabhol.<sup>35</sup> Enron's proposal also did not undergo a standard competitive bidding process in India.<sup>36</sup> When the terms of the deal were disclosed, the project was condemned on the basis that it was secured and sustained by corruption.<sup>37</sup> Critics pointed to testimony of an Enron official before a U.S. Congressional Committee in 1995, wherein it was reported that Enron had spent \$20 million on educational gifts for the project; this was identified by commentators as a possible source of bribes.<sup>38</sup>

The deal was also criticized on substance. Under the terms of the Power Purchase Agreement between the Dabhol Power Corporation (DPC – owned by Enron, Bechtel, and General Electric) and the MSEB, the MSEB agreed to buy 90% of the power generated by the project regardless of market demand for electricity and at a cost well above that of other available

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Parikh, *Thinking through the Enron Issue*, 36(17) ECON. & POL. WKLY. 1463 (28 April 2001) (hereinafter Parikh); Tony Allison, *Enron's Eight-Year Power Struggle in India*, ASIA TIMES ONLINE (18 January 2001) (hereinafter Allison).

<sup>30</sup> Parikh, *supra* note 29 at 1463.

<sup>31</sup> *Id.* For an account of the case for this reform of India's energy sector by a U.S. legal academic who is also an international arbitrator, see Jeswald W. Salacuse, *Renegotiating International Project Agreements*, 24 FORDHAM INT'L L.J. 1319, 1344-1346 (2000) (hereinafter Salacuse).

<sup>32</sup> Human Rights Watch, *supra* note 29, at Part I; ICC Arbitration award, *supra* note 2, at 17.

<sup>33</sup> Seven other power projects were established in India around the same time as the Dabhol project. *Private power project scrapped*, 25(4) THE ECOLOGIST 1 (July-August 1995) (hereinafter *Private power project scrapped*); *So Many Dabhols*, 30(33) ECON. & POL. WKLY. 2023 (19 August 1995) (hereinafter *So Many Dabhols*).

<sup>34</sup> Human Rights Watch, *supra* note 29, at Parts I & III.

<sup>35</sup> See Parikh, *supra* note 29, at 1463.

<sup>36</sup> *Id.*

<sup>37</sup> *So Many Dabhols*, *supra* note 33, at 2024 ("The rent element in these deals as in the agreements for the 'fast track' power projects is so blatant that corruption and bribery are to be expected, indeed to be taken for granted.... [T]he ultimate blame must rest on the architects of the current economic policies which have elevated foreign investment and privatisation to the status of national goals with the result that today no deal is so outrageous that it cannot be justified on those grounds and pushed through.").

<sup>38</sup> Kundra, *supra* note 29, at 932, citing Allison, *supra* note 29; Subodh Wagle, *TNCs as Aid Agencies? Enron and the Dabhol Power Plant*, 26(4) THE ECOLOGIST 179, 180 (1996).



energy sources.<sup>39</sup> The tariff was denominated in U.S. dollars such that the MSEB would bear the currency risk over the project's lifetime. For its fuel supply, the project depended on imports of liquid natural gas (LNG) from Qatar, where Enron had entered into a joint venture to develop LNG.<sup>40</sup> The Government of Maharashtra guaranteed the MSEB's liabilities under the deal and the Government of India counter-guaranteed the Maharashtra guarantee.<sup>41</sup> In contrast to the MSEB's liabilities, it was argued that Enron's commitments to performance targets were subject only to modest penalties or even rewards for performance failures.<sup>42</sup> In one detailed economic analysis of the deal, it was found that that performance guarantees and related penalties undertaken by the DPC did not constitute a substantial burden on the DPC; that the DPC's profitability (estimated to be a real, post-tax, internal rate of return of 28%) was very high compared to that prescribed by Indian government consultants (17 to 21%); and that the project would be viable for the MSEB only if the MSEB's average tariff increased at a rate of more than 14.5% per year over a 20-year period.<sup>43</sup> In these respects, the deal was considered highly unfavourable by Indian commentators from the perspectives of national energy policy, consumers, taxpayers, and other local interests that would bear costs of the project.<sup>44</sup> Notably, in 1993, the World Bank declined to finance the Dabhol project on the basis that it was not economically viable following a World Bank review in 1992 that characterized the deal as one-sided in favour of Enron.<sup>45</sup>

Once the project was underway, public opposition intensified as its social and environmental impacts became apparent. Public protests took place against land acquisitions and encroachments on fishing and water access by affected communities.<sup>46</sup> According to a report in the *Ecologist*, the project threatened the livelihoods of about 10,000 people, mainly fishers and farmers.<sup>47</sup> Authorities in India engaged in violent repression of this opposition, and Enron and the U.S. government were complicit in human rights violations associated with the project, according to a report by Human Rights Watch in 1999.<sup>48</sup> Among the conclusions of this report were the following:<sup>49</sup>

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<sup>39</sup> P. Purkayastha, *Enron: The Drama Continues*, 30(33) ECON. & POL. WKLY. 2042 (19 August 1995) (hereinafter Purkayastha); Kundra, *supra* note 29, at 918.

<sup>40</sup> Salacuse, *supra* note 31, at 1347.

<sup>41</sup> Kannan Srinivasan, *Indian Law and the Enron Agreement* 30(20) ECON. & POL. WKLY. 1153, 1153 (20 May 1995) (hereinafter Srinivasan).

<sup>42</sup> Girish Sant, Shantanu Dixit & Subodh Wagle, *Dabhol Project PPA – Structure and Techno-Economic Implications*, 30(24) ECON. & POL. WKLY. 1449, 1455 (17 June 1995) (hereinafter Sant, Dixit & Wagle).

<sup>43</sup> *Id.* at 1455.

<sup>44</sup> For a review of the economics of the project, see Sant, Dixit & Wagle, *supra* note 42; *Lessons from Dabhol*, 36(5/6) ECON. & POL. WKLY. 427 (3-10 February 2001).

<sup>45</sup> Human Rights Watch, *supra* note 29, at Part II, *citing*, among other World Bank sources, a letter from Joëlle Chassard, World Bank Senior Financial Analyst, Energy Operations Division, India Country Department to U.K. Mukhopadhyay, Maharashtra State Secretary for Energy and Environment (8 July 1992). See also Deeptha Mathavan, *From Dabhol to Ratnagiri: The Electricity Act of 2003 and Reform of India's Power Sector*, 47 COLUM. J. TRANSNAT'L L. 387, 403 (2008) (hereinafter Mathavan).

<sup>46</sup> Human Rights Watch, *supra* note 29, at Part III.

<sup>47</sup> *Private power project scrapped*, *supra* note 33.

<sup>48</sup> Human Rights Watch, *supra* note 29.

<sup>49</sup> *Id.* at Summary and Recommendations.

.... examining the state's response to opposition to the Dabhol Power Corporation, Human Rights Watch believes that the state government of Maharashtra has engaged in a systematic pattern of suppression of freedom of expression and peaceful assembly coupled with arbitrary detentions, excessive use of force, and threats....

In addition to the state, Human Rights Watch believes that the Dabhol Power Corporation and its parent company Enron are complicit in these human rights violations. Enron's local entity, the Dabhol Power Corporation, benefited directly from an official policy of suppressing dissent through misuse of the law, harassment of anti-Enron protest leaders and prominent environmental activists, and police practices ranging from arbitrary to brutal. The company did not speak out about human rights violations and, when questioned about them, chose to dismiss them altogether.

But the Dabhol Power Corporation's responsibility, and by extension, that of the consortium and principally Enron, goes beyond a failure to speak out about human rights violations by the state police. The company, under provisions of law, paid the abusive state forces for the security they provided to the company.... In addition, contractors (for DPC) engaged in a pattern of harassment, intimidation, and attacks on individuals opposed to the Dabhol Power project.... When these activities were brought to the company's attention, the Dabhol Power Corporation refused to acknowledge that its contractors were responsible for criminal acts and did not adequately investigate, condemn, or cease relationships with these individuals.

.... Human Rights Watch considers that the financiers of Phase I of the project's construction (1992-99) and U.S. government agencies that financed and lobbied for the project are complicit in the human rights violations. In particular, the U.S. government bears special responsibility because of its aggressive lobbying on behalf of the three U.S.-based companies developing the project and because it extended hundreds of millions of dollars in public funds for the project while seemingly indifferent to human rights-related conditionalities that apply to such transactions.

Public opposition to the Dabhol project was a major factor in the Maharashtra state election in 1995, which led to the election of a coalition government of two parties (Bharatiya Janata Party and Shiv Sena) that were committed to cancelling the project.<sup>50</sup> After the election, the government established a high-level Cabinet Committee to review the project.<sup>51</sup> The Committee's report confirmed concerns that the delivered cost of power from the project would impose heavy losses on the Maharashtra State Electricity Board (MSEB), that the MSEB's commitment to purchase 90% of the energy produced by the project would require it to back down its own cheaper generation plants, and that the dependence on liquid natural gas to fuel

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<sup>50</sup> *Id.*, at Part II.

<sup>51</sup> Parikh argues that the delay caused by the decision to review the project – rather than to cancel it outright after the election – enabled Enron to inflate its costs and liabilities in anticipation of litigation from \$100 million to \$300 million. Parikh, *supra* note 29, at 2042 (“Enron has spent this entire period of review in bringing in its equity early and awarding contracts to a large number of contractors with an eye to filing large cancellation claims.”).

the project would be a major drain on India's balance of payments.<sup>52</sup> Based on the report's recommendations, the Government of Maharashtra took steps to cancel the project.<sup>53</sup>

In response, Enron initiated arbitration in London under the dispute settlement clause of the Power Purchase Agreement between the Dabhol Power Corporation (DPC) and the MSEB,<sup>54</sup> while Indian entities pursued actions in domestic courts in India.<sup>55</sup> The U.S. government reportedly objected strongly to the project's cancellation and claimed that it would have negative consequences for foreign investment in India.<sup>56</sup> The litigation ended when Enron and the Maharashtra Government agreed in 1995 to renegotiate the deal. The renegotiation led to modest changes in the size, tariffs, payment terms, environmental monitoring, and ownership of the project.<sup>57</sup> However, opposition to the project continued in India with renewed claims of corruption.<sup>58</sup>

By 2000, the first phase of the project had been in operation for about 18 months and a second was expected to come on line the following year.<sup>59</sup> However, at this stage, energy demand was below the forecasts underlying the project and the cost of power from the project was very high.<sup>60</sup> The Maharashtra Government announced a further review of the project, which concluded that the MSEB was "financially incapable of meeting its payment obligation" and proposed a further renegotiation to de-peg the tariffs from the U.S. dollar, restructure the fuel supply arrangements, and increase financial support to the MSEB from the state and national governments.<sup>61</sup> A few months later, the Maharashtra Government – alleging breach of the Power Purchase Agreement by the DPC – ceased its payments to the DPC, and the Indian

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<sup>52</sup> Purkayastha, *supra* note 39. This report followed an earlier one, also critical of the terms of the project, by India's Parliamentary Standing Committee on Energy (29 May 1995), *excerpted in* Human Rights Watch, *supra* note 29, at Appendix C.

<sup>53</sup> See Kundra, *supra* note 29, at 917.

<sup>54</sup> The arbitration clause in the Dabhol Power Purchase Agreement provided for the resolution of disputes via arbitration in London under the UNCITRAL Rules, with default appointment powers allocated to the president of the Electricity Supply Industry Arbitration Association of England and Wales. The arbitration clause is reproduced in Srinivasan, *supra* note 41, at 1153.

<sup>55</sup> Parikh, *supra* note 29, at 1463. This litigation in Indian courts was itself characterized by some U.S. commentators and by the ICC Arbitration tribunal, *supra* note 2, at 27-31, as a violation of the DPC Shareholders Agreement and other sources of law. However, the discussion was more at the level of policy debate than legal analysis. See, e.g., Bettauer, *supra* note 5. Notably, Bettauer's sources for the factual background on the Dabhol project were limited to an article in a U.S. journal, the American Arbitration Association (AAA) and ICC Arbitration awards issued in the U.S., a memorandum filed by the Overseas Private Investment Corporation in the AAA arbitration, and the U.S. government's Request for Arbitration against India arising from the OPIC pay-out, Bettauer, *supra* note 5, at 382 (note 7). They did not include any Indian sources.

<sup>56</sup> Salacuse, *supra* note 31, at 1352. For a reaction from one Indian source to the claims of U.S. officials, see *So Many Dabhols*, *supra* note 33, at 2023 ("Take, for instance, the US energy secretary who on lobbying visits to this country earlier this year had read us the riot act and told us in no uncertain terms that cancellation of the Enron project would jeopardize all the private power projects being proposed for international financing...").

<sup>57</sup> Parikh, *supra* note 29, at 1463; Salacuse, *supra* note 31, at 1352-1356.

<sup>58</sup> Human Rights Watch, *supra* note 29, at Part II.

<sup>59</sup> Parikh, *supra* note 29, at 1463.

<sup>60</sup> Kundra, *supra* note 29, at 919.

<sup>61</sup> *Id.*, where these findings of the Godbole Committee report of 10 April 2001 are reproduced.

government declined to make payments under its counter-guarantee of the MSEB's, citing the contractual dispute.<sup>62</sup>

At this point, the dispute became, as Godbole put it, "a happy hunting ground for legal luminaries representing parties to the dispute".<sup>63</sup> International arbitrations were initiated against governments in India under investment contracts linked to the project, under treaties between India and countries in which corporate subsidiaries of Enron and other U.S. firms were located, and under state-to-state dispute settlement processes relating to the insurance role of the U.S. Overseas Private Investment Corporation (OPIC). First, the dispute under the Power Purchase Agreement was referred by the DPC to arbitration in London (and by the MSEB to Indian courts).<sup>64</sup> Second, Bechtel, as a co-owner of the DPC, referred a claim under the DPC Shareholders Agreement to the ICC Arbitration in New York.<sup>65</sup> Third, claims for about \$1.3 billion in compensation were reportedly launched by Bechtel and General Electric under India's bilateral investment treaties with Mauritius and the Netherlands.<sup>66</sup> Fourth, in a state-to-state arbitration, the U.S. government brought a claim against India after OPIC was required, in an American Arbitration Association proceeding in the U.S., to pay about \$110 million to Enron, Bechtel, General Electric, and Bank of America in risk insurance for the Dabhol project.<sup>67</sup>

Of these four arbitrations, only the ICC Arbitration led to a known and publicly available award. This is partly because, in 2005, an overall settlement was reached between the U.S. and Indian governments, as well as U.S. firms, which terminated outstanding arbitrations and court actions.<sup>68</sup> The terms of the settlement appear not to be public.<sup>69</sup> By this point, Enron, the main protagonist among the major firms involved in the project, had been dismantled in bankruptcy proceedings and its stake in the project sold to Bechtel and General Electric.<sup>70</sup> Also, in India, the energy sector had been reformed in 2003, partly in response to Dabhol, in order to diversify the electricity supply, strengthen competitive bidding, and establish an appeal process from

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<sup>62</sup> Kundra, *supra* note 29, at 919-922.

<sup>63</sup> Madhav Godbole, *Resolving Dabhol Tangle*, 39(23) ECON. & POL. WKLY. 2329, 2329 (5 June 2004) (hereinafter Godbole).

<sup>64</sup> See Kundra, *supra* note 29, at 922-923.

<sup>65</sup> See ICC Arbitration award, *supra* note 2.

<sup>66</sup> John J. Kerr & Janet Whittaker, *Dabhol Dispute – Legal questions remain unresolved*, 1 CONSTRUCTION L. INT'L 17(2006) (hereinafter Kerr & Whittaker). See also, Bettauer, *supra* note 5, at 382 (note 7) & 385, which refers (mistakenly, it appears) to the ICC Arbitration award, *supra* note 2, as an award under the India-Mauritius bilateral investment treaty.

<sup>67</sup> Bechtel Enterprises International Ltd. v. Overseas Private Investment Corporation, No. 50 T195 00509 02 (2003), available at: [http://www.opic.gov/sites/default/files/docs/2294171\\_1.pdf](http://www.opic.gov/sites/default/files/docs/2294171_1.pdf) (last accessed 15 July 2011); U.S. Initiates Arbitration against India over OPIC Claims for the Dabhol Power Project, 99 AM. J. INT'L L. 271 (2005).

<sup>68</sup> See Bettauer, *supra* note 5, at 384-385.

<sup>69</sup> The overall settlement is reported in Kundra, *supra* note 29, at 930; Bettauer, *supra* note 5, at 386-387; Kenneth Hanson, Robert O'Sullivan & W. Geoffrey Anderson, *The Dabhol Power Project Settlement: What Happened? And How?*, 3-4 (December 2005), available at: [http://www.chadbourne.com/files/Publication/a5aa1e52-4285-4bb5-87e6-7201123895a0/Presentation/PublicationAttachment/352f8f09-ae96-40fc-a293-720d0b8f0ca8/Dabhol\\_InfrastructureJournal12\\_2005.pdf](http://www.chadbourne.com/files/Publication/a5aa1e52-4285-4bb5-87e6-7201123895a0/Presentation/PublicationAttachment/352f8f09-ae96-40fc-a293-720d0b8f0ca8/Dabhol_InfrastructureJournal12_2005.pdf) (hereinafter Hanson, O'Sullivan & Anderson).

<sup>70</sup> See Mathavan, *supra* note 45, at 390. Enron Corporation declared bankruptcy in late 2001.

decisions of state energy regulators.<sup>71</sup> As discussed in the next section of this article, the ICC Arbitration provides a window on these larger disputes and controversies stemming from the Dabhol project.

#### IV. Outline of the ICC Arbitration in the Dabhol Case

One of the legal proceedings that arose from the Dabhol project was the ICC Arbitration initiated by Bechtel under the DPC Shareholders Agreement.<sup>72</sup> An outline of this arbitration is provided in this section, based primarily on a review of the tribunal's award. The arbitration is only one part of the Dabhol dispute, however, and the award is only one source of information on the role of international arbitration in this case. The arbitration is examined closely here because it appears to have generated the only award that is publicly available in relation to Dabhol<sup>73</sup> and in any international investment arbitration against India.<sup>74</sup> Yet the discussion is focused on a single primary source which remains, of necessity, a stand-alone example.

The ICC Arbitration was based on a contract, the Dabhol Power Corporation Shareholders Agreement, between the owners of the Dabhol project.<sup>75</sup> More broadly, the Dabhol project was based on agreements between the foreign investors – led by Enron, but including Bechtel and General Electric and various subsidiaries – and governments or state entities in India. Of these agreements, the key contract was a 20-year Power Purchase Agreement between the Dabhol Power Corporation (DPC – established by Enron, Bechtel, and General Electric at the outset of the project) and the Maharashtra State Electricity Board (MSEB).<sup>76</sup> These agreements established a governing structure for the project that involved corporate decision-making processes and the regulatory roles of the MSEB, the Maharashtra Government, and the Government of India. The project also involved other government actors, such as the U.S. EXIM bank (reportedly as a source of financing for the project) and OPIC (as a risk insurance provider).<sup>77</sup> Finally, disputes arising from the Dabhol project were subjected to adjudication before courts in India as well as international tribunals whose authority was derived from the various contracts and, it appears, from bilateral investment treaties concluded by India.<sup>78</sup>

As indicated, the ICC Arbitration did not take place under the Power Purchase Agreement, which was the main contract for the Dabhol project. Rather, it was initiated under the Shareholders Agreement that established the DPC as the immediate owner of the project. In

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<sup>71</sup> *Id.* at 396-403.

<sup>72</sup> ICC Arbitration award, *supra* note 2.

<sup>73</sup> The UNCITRAL arbitration award appears not to be public. The OPIC award is public, *supra* note 67, but was conducted between a U.S. firm and OPIC and not under an investment contract or treaty. Other arbitrations arising from the Dabhol project have been reported but are not known to have led to an award; *supra* note 66.

<sup>74</sup> In general, it is difficult to research contract-based investment arbitrations because of the confidentiality of investment contracts and the relevant arbitrations. In some instances, an award may be released by a party that has access to it, as in the case of the present ICC Arbitration; *supra* note 2.

<sup>75</sup> ICC Arbitration award, *supra* note 2, at 1-4.

<sup>76</sup> Sant, Dixit & Wagle, *supra* note 42.

<sup>77</sup> *Dabhol: Suicidal First Step*, 29(1/2) ECON. & POL. WKLY, 23 (1-8 January 1994).

<sup>78</sup> *Supra* note 66.

turn, the DPC was owned originally, through subsidiaries, by Enron (80% equity), Bechtel (10%), and General Electric (10%).<sup>79</sup> As of 1996, however, as part of the renegotiation of the project, an Indian company (the Maharashtra Power Development Corporation – MPDC) became a party to the Shareholders Agreement after acquiring a minority share in the DPC.<sup>80</sup> The MPDC was reportedly controlled by the MSEB and the Maharashtra state government.<sup>81</sup> Thus, by 1996, the parties to the Shareholders Agreement included three Mauritius-based subsidiaries of Enron, Bechtel, and General Electric, respectively, and the MPDC. Based on this agreement, Bechtel<sup>82</sup> initiated the ICC Arbitration against the MPDC and named the MSEB and the Maharashtra government as additional, even though they were not signatories of the Shareholders Agreement.<sup>83</sup>

The ICC Arbitration tribunal consisted of three arbitrators.<sup>84</sup> The proceedings were held, and situated as a matter of law, in New York.<sup>85</sup> The arbitration was conducted under the rules of the International Chamber of Commerce (ICC) and under the auspices of the ICC's International Court of Arbitration based in Paris.<sup>86</sup> Only the claimant, Bechtel, took part actively in the arbitration.<sup>87</sup> The Indian respondents did not participate other than to object that the tribunal lacked jurisdiction and that decisions by courts in India precluded their participation in the arbitration as a matter of domestic law.<sup>88</sup> Thus, the tribunal faced a situation in which only the lawyers and experts acting on behalf of the claimant were present during the proceedings, leaving it to the tribunal to work out how to account for the interests of other parties.

The tribunal's award is 39-pages in length. The tribunal began the award by introducing the parties to the dispute,<sup>89</sup> highlighting provisions of the Shareholders Agreement, and reporting Bechtel's claims against the MPDC.<sup>90</sup> In summary, as indicated in the award, Bechtel claimed that the MPDC breached the Shareholders Agreement by refusing to support Bechtel's nominees to the Board of Directors of the DPC (presumably after most of the board members resigned following Enron's bankruptcy), by interfering with the rights and interests of the DPC,

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<sup>79</sup> See Kundra, *supra* note 29, at 914-915.

<sup>80</sup> *Id.* (reporting that the MSEB acquired a 30% equity share of the DPC in 1996, reduced to 15% in 2000. It is assumed for present purposes that the MSEB owned this equity share via the MPDC).

<sup>81</sup> See ICC Arbitration award, *supra* note 2, at 3-4.

<sup>82</sup> See ICC Arbitration award, *supra* note 2, at 2. Although subsidiaries of Bechtel and General Electric were parties to the ICC Arbitration, only the Bechtel subsidiary took part fully in the arbitration such that its rights and obligations were determined in the award.

<sup>83</sup> See ICC Arbitration award, *supra* note 2, at 3-4. Thus, three entities were sued by Bechtel. The first was the MPDC, which reportedly held shares in the DPC on behalf of the MSEB and which was a party to the Shareholders Agreement. The second and third were the MSEB and the Maharashtra government, which were not parties to the Shareholders Agreement but were sued based on links to the MPDC.

<sup>84</sup> ICC Arbitration award, *supra* note 2.

<sup>85</sup> ICC Arbitration award, *supra* note 2, at 39.

<sup>86</sup> Rules of Arbitration of the International Chamber of Commerce (revised 1 January 1998) (hereinafter ICC Rules of Arbitration).

<sup>87</sup> ICC Arbitration award, *supra* note 2, at 2-3.

<sup>88</sup> *Id.* at 16-17.

<sup>89</sup> *Id.* at 2-4.

<sup>90</sup> *Id.* at 4-10.

and by initiating proceedings in Indian courts to stay the ICC Arbitration.<sup>91</sup> On this basis, Bechtel sought about \$160 million in compensation, said to include the value of its total investment in the project as well as legal and arbitration costs.<sup>92</sup>

After highlighting Bechtel's claims, the tribunal provided a short history of the proceedings including the basis on which the tribunal was constituted.<sup>93</sup> The tribunal then explained briefly (in about 4 pages) why it rejected the Indian parties' jurisdictional objections that (1) the policy decisions of the Maharashtra Government with respect to the project were outside the scope of the arbitration clause in the Shareholders Agreement and (2) the MSEB and the Maharashtra Government were not parties to the Shareholders Agreement and thus had not consented to the arbitration.<sup>94</sup> Having dismissed these objections, the tribunal turned to the merits of the case<sup>95</sup> by outlining various agreements, beyond the Shareholders Agreement, that related to the project and by highlighting the overall role of the MSEB, the Maharashtra Government, and the Government of India in the project.<sup>96</sup> The tribunal also touched on the 1995-1998 period in which the Maharashtra Government came to oppose the project, before turning to events that led directly to the ICC Arbitration.<sup>97</sup>

After this discussion, which appeared to set the stage for the tribunal's reasons on the merits of Bechtel's claims, the tribunal turned abruptly to its conclusions. And, with virtually no further discussion, the tribunal found in favour of Bechtel on all issues, including issues not otherwise identified in the award.<sup>98</sup> Thus, in less than 2 pages, the tribunal simply declared that the MPDC violated the Shareholders Agreement, that the MSEB and the Maharashtra government were "affiliates" of MPDC, and that these affiliates were jointly and severally liable for damages owned by the MPDC.<sup>99</sup> Further, the tribunal concluded that the overall conduct of the Indian parties violated not only the Shareholders Agreement but also other agreements related to the project.<sup>100</sup> Next, although it had not to this point identified any specific claims by Bechtel on these issues, the tribunal found that the "coordinated course of conduct" by the Indian parties was "in violation of... the applicable standards of international law requiring recognition of written agreements to submit to international arbitration and forbidding uncompensated expropriation of Claimant's property".<sup>101</sup> Finally, the tribunal added portentous conclusions that the Indian parties' overall conduct "operated as a total expropriation of the Claimant's investment in the Project, and resulted in depriving Claimant of its fundamental rights in the Project and the entire benefit of its investment therein".<sup>102</sup>

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<sup>91</sup> *Id.* at 8-9 & 28.

<sup>92</sup> *Id.* at 9-10. Bechtel also sought injunctions against the Respondent's participation in court proceedings in India.

<sup>93</sup> *Id.* at 10-15.

<sup>94</sup> *Id.* at 16-19.

<sup>95</sup> *Id.* at 19-31.

<sup>96</sup> *Id.* at 19-25.

<sup>97</sup> *Id.* at 25-30.

<sup>98</sup> *Id.* at 30-31.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 31.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

Having reached these conclusions on the merits in favour of Bechtel, the tribunal provided more elaborate reasons for its decision on damages. In the result, it awarded compensation for most of Bechtel's claims, for a total award of \$94.7 million plus all of Bechtel's legal and arbitration costs and pre and post-award interest.<sup>103</sup>

#### V. Review of the ICC Arbitration from a TWAIL perspective

The TWAIL approach is employed in this section to elaborate three points about the ICC Arbitration. First, the tribunal appeared to approach its role, not as that of a commercial arbitration tribunal acting under the contract that authorized its establishment by the parties to the contract, but as a body enforcing a broader review mechanism for policy choices of the MSEB and the Maharashtra Government. Second, aspects of the ICC Arbitration, relating to the structure and process of the arbitration as well as the content of the tribunal's award, offer reasons to support perceptions of regime bias in international arbitration. Third, the ICC Arbitration occurred in the context of a broader conflict between Western and Third World interests.

##### *The Tribunal's Review of Third World Interests*

The first point about the ICC Arbitration arises from the tribunal's approach to its authority and to the purposes of the arbitration. In effect, the tribunal treated the arbitration – which originated in a Shareholders Agreement between owners of the DPC – as a venue in which to review far-reaching policy decisions of the Maharashtra Government. This indicated how an investment arbitration tribunal may interpret its authority expansively in order to facilitate review of regulatory choices and judicial decisions of domestic actors. It also indicated how international arbitration may be used to discipline constituencies in the Third World where their concerns are taken up by an elected government.

The tribunal did not limit its authority to the immediate dispute between the parties to the Shareholders Agreement based on the terms of that contract. Instead, the tribunal invoked the concept of an "affiliate"<sup>104</sup> as a basis to conclude that the Indian party to the contract, the MPDC, "was [the Maharashtra government] and MSEB operating in the DPC corporate structure".<sup>105</sup> This conclusion was reached without mention of any legal doctrine to justify subjecting these non-contracting parties to the tribunal's authority. Its apparent effect was to lift the corporate veil of the MPDC in order to expose the Maharashtra Government treasury to liability. Whether it was appropriate for the tribunal to do this in the circumstances is not the critical point here; the point is that this was an approach to the separate legal personality of the company which, as a matter of private law, called for reasons to justify it.<sup>106</sup> More broadly, by

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<sup>103</sup> *Id.* at 32-39.

<sup>104</sup> *Id.* at 5, 18 & 25.

<sup>105</sup> *Id.* at 17.

<sup>106</sup> Hanson, O'Sullivan & Anderson, *supra* note 69, at 3. As an aside, the principle of separate corporate personality was integral to activities of Enron, Bechtel and General Electric in the Dabhol case. For example, it presumably would have enabled the parent firms to structure their interests, via companies in Mauritius and



adopting this flexible approach to the corporate personality of the MPDC, the tribunal assumed a review function that went well beyond the role of a typical commercial arbitration tribunal resolving an autonomous dispute between parties to the relevant contract.

In addition, the tribunal expanded its remit by taking an expansive approach to the sources of law that it could apply.<sup>107</sup> The tribunal assumed the authority to review compliance of the Indian parties not only with the Shareholders Agreement, based on Bechtel's claims, but also with other contracts and other sources of law.<sup>108</sup> First, the tribunal assumed the authority to interpret and apply the Power Purchase Agreement between the DPC and the MSEB, neither of which were parties to the Shareholders Agreement. Notably, the Power Purchase Agreement was subject to UNCITRAL arbitration in London, not ICC arbitration in New York.<sup>109</sup> Second, the tribunal assumed the authority to rule on the Maharashtra Government's guarantee of the DPC's obligations under the Power Purchase Agreement.<sup>110</sup> Third, the tribunal likewise assumed the authority to rule on a State Support Agreement between the DPC and the Maharashtra Government.<sup>111</sup> Fourth, the tribunal decided to apply New York law, which it cited as the governing law of the Shareholders Agreement without outlining a contractual provision to this effect.<sup>112</sup> Fifth, the tribunal assumed authority over "the applicable body of international law" without identifying a specific provision of the Shareholders Agreement that authorized it to apply international law.<sup>113</sup>

By these steps, the ICC tribunal assumed a broad supervisory role over policy decisions of Indian government actors against a wide range of legal obligations. The policy decisions, relating to the cancellation or renegotiation of the Dabhol project, were supported by diverse constituencies in Maharashtra and elsewhere in India. By assuming a broad authority to review Indian government actors, therefore, the tribunal also positioned itself to discipline wider groupings of Third World interests that opposed the project.

### *The Make-Up of the Tribunal as an Apparent Example of Regime Bias*

A second point about the ICC Arbitration is that it is open to criticism based on the concept of regime bias in international decision-making. As outlined by Gathii, the regime bias approach in TWAIL "traces the particular manner in which market rules and norms have been applied or interpreted where the stakes involve an interest of a Third World country in the global

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elsewhere, in a manner that provided tax benefits, an investment platform, and access to bilateral investment treaty arbitration against India.

<sup>107</sup> See ICC Arbitration award, *supra* note 2, at 30-31.

<sup>108</sup> Bechtel's claims in the arbitration, as reported by the tribunal in its award, were limited to the Shareholders Agreement. *Id.* at 8-9.

<sup>109</sup> *Supra* note 53.

<sup>110</sup> ICC Arbitration award, *supra* note 2, at 21-22 & 31.

<sup>111</sup> *Id.* at 22 & 31.

<sup>112</sup> *Id.* at 18.

<sup>113</sup> This source is also described by the tribunal as "the applicable standards of international law requiring recognition of written agreements to submit to international arbitration and forbidding uncompensated expropriation of Claimant's property", ICC Arbitration award, *supra* note 2, at 31. Again, no specific source of international law is identified.

economy”.<sup>114</sup> It also refers to “the choices made between alternative ways of crafting legal rules, the meanings ascribed to a particular rule in its application by an administrative agency or at the adjudication stage by a domestic judicial body or an international tribunal”.<sup>115</sup> Aspects of the ICC Arbitration highlighted in this section and the next offer support for the premise that regime bias existed against constituencies in India that opposed the project.<sup>116</sup> The discussion is not intended to inquire into or suggest actual bias in the arbitration, but rather to indicate how aspects of the arbitration provided a reasonable basis for concern about regime bias.<sup>117</sup>

Several aspects of the structure and process of the ICC Arbitration raise concerns about possible regime bias. One is with respect to the constitution of the tribunal. The DPC Shareholders Agreement provided, in the absence of an appointment by the Indian parties of their arbitrator on the tribunal, for the arbitrator to be appointed by the Chief Judge of the US District Court for the Southern District of New York.<sup>118</sup> On this basis, once Bechtel appointed as its arbitrator James H. Carter, a U.S. commercial lawyer,<sup>119</sup> a U.S. court then decided to appoint as the Indian parties’ arbitrator another U.S. commercial lawyer, Jonathan Rosner.<sup>120</sup> Carter and Rosner then appointed as the presiding arbitrator Louis A. Craco, also a U.S. commercial lawyer.<sup>121</sup> Craco was approved by the ICC as the presiding member of the tribunal, thus constituting the tribunal of three U.S. commercial lawyers.<sup>122</sup> *Prime facie*, this make-up of the tribunal does not give the impression of a neutral and impartial forum for the resolution of a dispute between a U.S. firm and Third World interests in India.<sup>123</sup> Both the nationality and professional background of the arbitrators suggest a far greater affinity with U.S. and corporate interests than with the Indian constituencies that opposed the Dabhol project.

Also regarding the structure and process, the place and legal seat of the ICC Arbitration, as designated in the Shareholders Agreement, was New York.<sup>124</sup> This meant that any application to

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<sup>114</sup> See Gathii, *supra* note 4, at 261.

<sup>115</sup> *Id.* at 262.

<sup>116</sup> The Indian constituencies that opposed the Dabhol project were subject indirectly to the ICC Arbitration as a result of the tribunal’s review of decisions of the MSEB and the Maharashtra government.

<sup>117</sup> On the distinction between actual and perceived bias, see Gus Van Harten, *Investment Treaty Arbitration, Procedural Fairness, and the Rule of Law*, in INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW, Ch. 20 (Stephan W. Schill ed., Oxford University Press 2010).

<sup>118</sup> ICC Arbitration award, *supra* note 2, at 6.

<sup>119</sup> *Id.* at 10; Carter is a partner with the law firm Dewey & LeBoeuf in New York, with listed practice areas including international arbitration, antitrust, litigation, project finance and infrastructure, and intellectual property, *available at*: <http://www.deweyleboeuf.com/en/People/C/JamesHCarter.aspx> (last accessed 15 July 2011).

<sup>120</sup> ICC Arbitration award, *supra* note 2, at 12; Rosner passed away in 2008 after a long career as a commercial lawyer and litigator in New York. ALM LEGAL INTELLIGENCE, *Obituary: Jonathan L. Rosner* (15 January 2008).

<sup>121</sup> ICC Arbitration award, *supra* note 2, at 12; Craco is a partner with the New York-based law firm Willkie Farr & Gallagher, with listed practice areas including general business litigation, arbitration, commercial and corporate law disputes, and other areas, *available at*: <http://www.thecca.net/bio.aspx?id=12> (last accessed 15 July 2011).

<sup>122</sup> ICC Arbitration award, *supra* note 2, at 12.

<sup>123</sup> For criticism of the role of Indian courts in the Dabhol case, outlined by a former U.S. government official, see Bettauer, *supra* note 5.

<sup>124</sup> ICC Arbitration award, *supra* note 2, at 7.

set aside the award based on the New York Convention would be decided in New York courts.<sup>125</sup> Further, the arbitration was conducted under the ICC's Arbitration Rules, which give supervisory authority over various aspects of the arbitration to the ICC International "Court" of Arbitration.<sup>126</sup> It is very likely that Enron and other U.S. firms involved in the Dabhol project were members of the ICC or its National Committee in the U.S. – the U.S. Council for International Business – at the time of the ICC Arbitration.<sup>127</sup> Further, it is reasonable to assume that ICC, "[t]he world business organization",<sup>128</sup> would be more attuned to the interests of major firms than those of the constituencies in India that opposed the project.<sup>129</sup>

These institutional aspects of the ICC Arbitration give reason to suspect that the tribunal would reflect a predisposition against the Indian parties due to the make-up of the tribunal, the location of the arbitration, and the supervisory role of the ICC. The structure of the decision-making process was established by an agreement among the owners of the DPC, including the MPDC, and can be characterized simply as part of a consensual agreement underlying the contract, including on the issue of whether the dispute settlement process was open to any apparent bias. From the perspective of regime bias, however, this would only trace the basis for suspicion of bias to another part of the story of the project; that is, to the point at which the Shareholders Agreement was concluded and then extended to the MPDC. It would also entail an acceptance that the dispute settlement arrangements in that contract – and perhaps many other investment contracts – are designed and understood to favour the Western parties at the expense of Third World interests. The discussion here, drawing on the regime bias approach, seeks to examine the claim that international adjudication provides a fair and independent method to interpret international rules. Having peeled away the institutional layers, it seems that the ICC Arbitration does at least offer a basis on which to suspect "bias... traced in the way in which rules of

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<sup>125</sup> Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June, 1958, 330 U.N.T.S. 3, at art. V (hereinafter New York Convention).

<sup>126</sup> ICC Arbitration award, *supra* note 2, at 7. The scare quotes are included only because the ICC International Court of Arbitration is a business entity that is not characterized by safeguards of judicial independence that apply to domestic and international courts. Yves Dezaley and Bryant Garth described the ICC Court of Arbitration as "an oversight committee that reviews arbitration appointments and decisions [and that] appears to be particularly sensitive to the business clientele...", YVES DEZALEY & BRYANT GARTH, *DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER* 45 (University of Chicago Press 1996) (hereinafter DEZALEY & GARTH).

<sup>127</sup> See International Chamber of Commerce, available at: <http://www.iccwbo.org/id19696/index.html> (last accessed 15 July 2011) ("ICC membership groups thousands of companies of every size in over 130 countries worldwide. They represent a broad cross-section of business activity including manufacturing, trade, services and the professions. Through membership of ICC, companies shape rules and policies that stimulate international trade and investment. These companies in turn count on the prestige and expertise of ICC to get business views across to governments and intergovernmental organizations, whose decisions affect corporate finances and operations worldwide.").

<sup>128</sup> See International Chamber of Commerce, available at: <http://www.iccwbo.org/> (last accessed 15 July 2011).

<sup>129</sup> It is acknowledged that the ICC Court of Arbitration is a semi-autonomous entity within the ICC, but the ICC Court is nonetheless not institutionally independent in the manner of state-based domestic and international courts. Incidentally, in 2008, the ICC Court's chair (Pierre Tercier) resigned, reportedly because of objections that the body was not sufficiently independent of the ICC Secretariat; N. Goswami, *ICC left reeling as arbitration court chairman Tercier resigns*, THE LAWYER (31 March 2008); See also DEZALEY & GARTH, *supra* note 127.

international... investment are crafted, applied and adjudicated... between Third World countries and the interests of international capital”.<sup>130</sup>

*The Content of the Tribunal’s Award as an Apparent Example of Regime Bias*

These institutional reasons to suspect regime bias are supported by an analysis of the content of the tribunal’s award. On nearly every issue, the tribunal decided in favour of Bechtel and against the Indian parties. In particular, with the exception of one aspect of its decision on damages, the tribunal favoured Bechtel in its historical account of the project and on its decisions on all issues of jurisdiction, the merits, and remedy. Moreover, in most instances, there was little or no explanation for why the tribunal decided against the Indian parties in the way that it did. These aspects of the award are reviewed in this section.

The first aspect involves the tribunal’s characterization of the history of the project. This characterization was highly favourable to the role of the U.S. firms and attached blame to Indian actors for the project’s failure. Above all, the tribunal attributed the breakdown of the project to regulatory failings of the MSEB and to the political parties that won the Maharashtra elections in 1995 and 1999. According to the tribunal:<sup>131</sup>

In the elections of 1995, two major opposition parties..., both dedicated to a wide range of measures to rid [Maharashtra] of “alien” influences, came to power. In the course of their campaigns they had stirred up substantial popular opposition to the Project. When the two parties formed a coalition government, they set about reversing years of encouragement given to the Project by their predecessors...

.....

These additional financial obligations [arising from obligations to purchase power from the project in 1999-2000] loomed at a time when MSEB was suffering the consequences of years of politically popular but fiscally unsound energy policies. For years there had been a program of politically motivated subsidies to selected classes of power consumers, together with handouts and favors to large power-consuming constituencies. MSEB had also failed to check rampant theft of electricity from the grid and unmetered service, both of which obviously depleted MSEB’s revenue stream. By 2000, MSEB itself admitted that more than half of the electricity it purchased and distributed was “lost” to these abuses.

At the same time, state election campaigns in 1999 re-ignited the clamor against the Project that had led to the 1995 repudiation. A coalition of parties with expressed hostility to the Project formed a government....

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<sup>130</sup> Gathii, *supra* note 4, at 261-262.

<sup>131</sup> ICC Arbitration award, *supra* note 2, at 2, 22-23 & 26. Incidentally, Bechtel’s claims, outlined in the ICC Arbitration award, framed the dispute as arising from “a dramatic reversal” of the energy policy of Maharashtra, “all as a result of political change in its government”.

It is not suggested here that this version of the history is positively and entirely inaccurate; Indian sources also identify benefits of the project as well as problems with India's energy sector.<sup>132</sup> However, in the award, there is no substantiation or serious analysis of the historical background that would justify the tribunal's version of events. Indeed, the tribunal cites no witness testimony or outside authority at all. The award also appears to contain factual errors. For example, regarding the renegotiation of the project in 1995, the tribunal found that an interim award issued in the UNCITRAL arbitration in London "forced [the Maharashtra Government] to retreat from its repudiation of the Project and to begin renegotiation of the Project Agreements".<sup>133</sup> No evidentiary basis is provided for this finding and other sources report that the government's decision to renegotiate, rather than cancel, the project was taken in the fall of 1995, several months before the reported UNCITRAL award.<sup>134</sup>

In contrast to this portrayal of the Indian parties, the tribunal portrayed the Dabhol project itself in a very generous light:<sup>135</sup>

[The Project] was intended to help remedy the acute shortfall in power already experienced in India and well documented internationally; it was also meant to furnish power to meet the increasing requirements of the planned major economic growth of the nation. These present and anticipated power shortfalls represented a pent-up and prospective demand that provided reasonable assurance of a market for the power to be produced by the Project.

At the same time, it was recognized that the public sector was a crucial player in deciding how, and on what terms, the power produced by the Project would be distributed among the consumers that would compete for it. The success of the Project thus demanded a sustained collaborative effort....

Once it was decided to situate the plants... in Maharashtra it was to [the Maharashtra government] and its responsible instrumentalities that the sponsors and DPC... looked for the necessary assurances. Those assurances came in the form of the "Project Agreements" which ultimately lie at the heart of this case. Those agreements were a Power Purchase Agreement... between MSEB and DPC, [a Maharashtra government] Guarantee in favor of DPC, and the State Support Agreement... executed by [the Maharashtra government]. Separately and in combination they defined a series of relationships and reciprocal obligations that were intended to codify the private-public collaboration on which the Project fundamentally rested, and to establish the agreed methods by which financial feasibility and adequate cash flows could be created and sustained....

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<sup>132</sup> Parikh, *supra* note 29 at 1468-9; Sebastian Morris, *Political Economy of Electric Power in India*, 31(21) ECON. & POL. WKLY. 1274 (25 May 1996).

<sup>133</sup> ICC Arbitration award, *supra* note 2, at 23. This reported UNCITRAL award could not itself be reviewed because it was not publicly available.

<sup>134</sup> See Kundra, *supra* note 29, at 917-918; Parikh, *supra* note 29, at 1463; Salacuse, *supra* note 31, at 1352-1353.

<sup>135</sup> ICC Arbitration award, *supra* note 2, at 20.

Thus, the project was characterized as addressing energy needs in India and supporting economic growth. These factors gave “reasonable assurance of a market for the power to be produced” so long as “the necessary assurances” were given by Indian government actors.<sup>136</sup> The tribunal did not mention any of the questionable aspects of the deal, such as the MSEB’s duty to buy power at a high tariff, the unlikelihood that the MSEB would be able to meet its obligations, or the World Bank’s refusal to finance the project. Compare the tribunal’s findings above to this conclusion reached by Godbole after a review of the project:<sup>137</sup>

It is... an eloquent commentary on how the Indian and foreign financial institutions, with all the expertise at their disposal, had failed to make an in-depth scrutiny of the project to establish its financial and economic viability before agreeing to finance it. Clearly, they had preferred to rely on the state government guarantee, counter-guarantee by [Government of India] and guarantees and insurance cover provided by export credit institutions....

Most importantly, the tribunal did not appear aware of, or chose not to report, information that would contribute to a more careful and balanced assessment of the responsibility of the various parties to the Dabhol deal. There was no mention of the one-sided terms of the Power Purchase Agreement, the inability of all of the parties to renegotiate on a sustainable basis, or the alleged corruption behind the deal. The tribunal also neglected to mention any of the concerns of Indian constituencies about the project’s impact on consumer rights, local fishing and farming, community access to land and water, and environmental protection, for example. Instead, the tribunal blamed political parties for stirring up opposition to the project in the 1995 election in Maharashtra and re-igniting opposition in the 1999 election.<sup>138</sup> This discounted any possibility that voters in India might have their own rational and coherent grounds to oppose the Dabhol project.

Information on these and other problems with the project was readily available when the tribunal’s proceedings began in 2004.<sup>139</sup> Such information was open to consideration when the tribunal reported that it “subjected the submissions of EEMC [the claimant and a Bechtel subsidiary] to a degree of heightened scrutiny that was required... because of the failure of the Respondents to appear and controvert them”.<sup>140</sup> However, the tribunal framed its award based on a rendition of the historical background that favoured heavily the role and contribution of U.S. investors while denigrating regulators and electoral processes in India.

The second aspect of the award that favoured Bechtel related to the tribunal’s discussion on issues of jurisdiction, whereby the tribunal expanded dramatically the scope of the arbitration. For one, the tribunal allowed claims by Bechtel against the MSEB and the Maharashtra government even though these actors were not parties to the Shareholders Agreement. Further, the tribunal incorporated various sources of law that went beyond the terms of the Shareholders

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<sup>136</sup> *Id.* at 20.

<sup>137</sup> Godbole, *supra* note 63, at 2331.

<sup>138</sup> ICC Arbitration award, *supra* note 2, at 22-23, 26.

<sup>139</sup> *Infra* note 157.

<sup>140</sup> ICC Arbitration award, *supra* note 2, at 1.

Agreement as reproduced in the award. On this basis, the tribunal assumed the authority to review and adjudge policy decisions associated with a wide range of constituencies that opposed the project. It also permitted Bechtel to make its claims and recover damages against Indian government actors.<sup>141</sup> And, once again, the tribunal provided limited reasoning to justify its decisions. For example, the tribunal found that it could interpret the conduct of the Indian parties under:<sup>142</sup>

the applicable body of international law includ[ing] the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards as well as certain international agreements to which India is a party creating a legal framework within which private investment in that country could be made.

However, the tribunal offered no legal reasoning to support the conclusion that sources of international law were applicable to a dispute under the Shareholders Agreement. The tribunal likewise did not mention a single example among the “certain international agreements” to which it referred, let alone analyze any treaty text.<sup>143</sup> If the tribunal was referring to bilateral investment treaties concluded by India, then the effect of its decision was to incorporate dozens of treaties into a contract without identifying any provision of the Shareholders Agreement authorizing the tribunal to do so.

The third aspect of the award was the decision on the merits of the dispute. Here, the tribunal found against the Indian parties on an astonishingly wide range of grounds. It concluded that the conduct of the Indian parties breached the Shareholders Agreement and other agreements, that it breached New York law, and that it amounted to an expropriation under international law.<sup>144</sup> Little or no analysis was provided to support these conclusions. On the issue of expropriation, for example, the question of whether a state entity’s breach of contract can amount to expropriation is complex and not settled in international law; yet the tribunal simply stated its conclusion on this issue without referring to any specific source or provision of law on expropriation or employing any legal reasoning.<sup>145</sup> The tribunal’s complete discussion of the issue of expropriation was as follows:<sup>146</sup>

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<sup>141</sup> ICC Arbitration award, *supra* note 2, at 17.

<sup>142</sup> *Id.* at 18.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 31.

<sup>145</sup> It is a complex legal question whether and in what circumstances a breach of contract – absent exhaustion of local remedies by the party claiming a breach of the contract (based on an exclusive dispute settlement clause in the contract) – could amount to an expropriation, denial of justice, or other breach of international law. *See* Kerr & Whittaker, *supra* note 66, at 18-19; and Kundra, *supra* note 29, at 923-930 (concluding after a careful analysis: “whether the use of host country judicial systems to avoid contractual obligations constitutes expropriation or a violation of international law is not a settled legal issue. In most cases, the inquiry will depend on whether the government actions have constituted a denial of justice.”). It is also a complex question, in the event that a breach of the contract was found, what compensation or other remedy should follow under international law. For a discussion of the latter question in the context of Indian law, *see* Srinivasan, *supra* note 41, at 1154 (noting that Indian law, as interpreted by the Supreme Court of India, treats electricity as a “material resource of the Indian people” that is compensable, on expropriation, for its book value rather than its market value).

<sup>146</sup> ICC Arbitration award, *supra* note 2, at 31.

Eighth, the coordinated course of conduct, including the several breaches found above, operated as a total expropriation of the Claimant's investment in the Project, and resulted in depriving Claimant of its fundamental rights in the Project and the entire benefit of its investment therein.

The lack of reasoning here is striking when one considers the breadth of the authority assumed by the tribunal and the significance of a finding that a government expropriated assets worth hundreds of millions of dollars. It is indicative of a general lack of reasoning to support the tribunal's conclusions that the Indian parties violated substantive provisions in several contracts, New York law, and international law.

The fourth aspect of the award is the tribunal's decision on the remedy. The tribunal awarded U.S. \$94.7 million to Bechtel (60% of the amount claimed),<sup>147</sup> which included compensation for all of the direct equity contributions reported by Bechtel as part of its claim but excluded "indirect, incidental, or consequential damages" that were not covered, according to the tribunal, by the Shareholders Agreement.<sup>148</sup> The tribunal arrived at the amount awarded without seeking an independent expert evaluation of the amounts claimed by Bechtel's counsel and expert.<sup>149</sup> Also, the tribunal included a further award of pre and post-award interest at the rate of 9% simple interest.<sup>150</sup> The tribunal attributed this interest rate to New York law without mentioning any specific provision in New York law for the rate or indicating why other rates (such as the LIBOR<sup>151</sup>) were not considered. Finally, the tribunal awarded to Bechtel all of its claimed legal costs, totaling over \$2.7 million, and the full arbitration costs of \$285,000, with post-award interest at 9%.<sup>152</sup> In total, about \$3 million in costs – evidently 100% of what Bechtel sought – was granted. Thus, although the remedial stage of the award did not go completely in Bechtel's favour, it nonetheless favoured Bechtel heavily based on the amount of compensation, the full recovery of legal and arbitration costs, and the chosen interest rate.

Overall, the tribunal decided in favour of Bechtel in its characterization of the background of the project, its approach to jurisdiction, its decisions on the merits, and – to a somewhat lesser extent – its decision on the remedy. A wide range of factual information that was relevant to the dispute as well as the policy decisions of the Indian government parties was not mentioned. For example, there was no mention in the award of:

- The economic imbalance underlying the project, including the allocation of supply risk, demand risk, and currency risk to the MSEB;
- The World Bank's negative review and decision not to finance the project;

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<sup>147</sup> ICC Arbitration award, *supra* note 2, at 34.

<sup>148</sup> *Id.* at 32-33.

<sup>149</sup> *Id.* at 32.

<sup>150</sup> *Id.* at 34 & 38.

<sup>151</sup> London Interbank Offered Rate, which is referenced in many international investment arbitrations.

<sup>152</sup> ICC Arbitration award, *supra* note 2, at 34-36.



- The allegations of corruption surrounding the project;
- The failures of Enron Corporation that led to its collapse in 2001;
- The human rights abuses attributed to Indian authorities and to Enron and the U.S. government by Human Rights Watch in its report in 2001;
- The concerns raised by constituencies in India, including in technical reviews,<sup>153</sup> about the project;
- The role played by activists, non-governmental organizations, and social movements in drawing attention to the project's problems and the role of this public opposition in the election of a Maharashtra Government that was committed to cancelling the project;<sup>154</sup> or
- The findings and conclusions of review processes in India that detailed a host of problems with the project, typically in much greater detail than the ICC Arbitration award.

Information about these matters was available on the public record at the time of the ICC Arbitration.<sup>155</sup> It may be that not all of the information was directly relevant to the Shareholders Agreement itself. However, much of it clearly was relevant to the arbitration, especially when one considers the extent to which the tribunal assumed the authority to review decisions of the Maharashtra Government and applied a wide variety of sources of law.

The absence of any discussion of this information in the award may be explained in part by the Indian parties' decision not to participate in the arbitration. However, the tribunal stated that it accounted for the position of the Indian parties in the litigation in order to ensure accuracy and fairness.<sup>156</sup> The tribunal reported, for example, that it "studied Claimant's evidentiary and legal submissions with special care, and has independently interrogated certain key witnesses about their written declarations, all to the end of satisfying itself that the result it reaches is correct and fair..."<sup>157</sup> In light of this, the tribunal's failure to refer to any of the above information suggests that it either did not inform itself of pertinent facts or did not put those facts to Bechtel's counsel and witnesses. In either case, the tribunal did not demonstrate a careful and balanced assessment of the Dabhol project.

This review of the ICC Arbitration award has highlighted aspects of the tribunal's decision-making that went against the Indian parties. Remarkably, there were no significant portions of the award, other than at the damages stage as discussed, that went in favour of the Indian

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<sup>153</sup> See, e.g., Sant, Dixit & Wagle, *supra* note 42.

<sup>154</sup> Human Rights Watch, *supra* note 29, at Parts II & III; Purkayastha, *supra* note 39, at 2042 ("The people of Maharashtra deserve all credit for this [repudiation of the Dabhol project in 1995], as it was their continued struggle that kept up the pressure on this ruinous project.").

<sup>155</sup> The tribunal was constituted in late April 2004. Various sources cited in this article, including reports in *Economic and Political Weekly*, U.S. law journals, and the Human Rights Watch report, *supra* note 29, were available on the public record at this time.

<sup>156</sup> ICC Arbitration award, *supra* note 2, at 1 & 19.

<sup>157</sup> *Id.* at 19.

parties. As mentioned, the tribunal provided little or no reasoning to justify its conclusions on many important issues. Alongside the make-up of the tribunal, this offers a basis on which to doubt the tribunal's impartiality and neutrality. The ICC Arbitration is only one example, of course, and the present review does not address other proceedings in the Dabhol case or investment arbitration generally. That said, the award is an notable example of apparent regime bias because ICC awards are generally confidential and because this is the only award in a known investment arbitration against India that is publicly available.<sup>158</sup> If this is the public face of investment arbitration against the Indian state, then there is cause for concern about other awards that are not subject to public scrutiny.

### *The Wider Conflict Between Western and Third World Interests*

A third point arising from a TWAIL perspective, which is highlighted briefly in this section, is that the ICC Arbitration was not a discrete commercial arbitration of an isolated dispute arising from a specific agreement to arbitrate. Rather, the arbitration was shaped into an arrangement to govern the regulatory relationship between major firms and governments in India. It also formed part of, and interacted with, a wider conflict between Western and Third World interests.<sup>159</sup> In this context, the arbitration relied on the authority of Western courts and ultimately on the political support of the U.S. government.

The wider conflict in this case involved a confrontation between actors and institutions in the U.S. (and, to a lesser extent, the U.K.) and India. In the course of the dispute, the U.S. and Indian parties both sought injunctions from courts in their respective jurisdictions. The Indian parties obtained injunctions to stay the London and New York arbitrations, while the U.S. parties sought or obtained injunctions from Western courts to enjoin the Indian parties from initiating actions in India and require their submission to arbitration.<sup>160</sup> The object of these actions was apparently to obstruct proceedings in the other side's venue. This reflected a contest of domestic judicial authority and of different sources of law, especially in the case of contractual provisions that were concluded in India but that provided for arbitration in the U.S. or the U.K. Based on these provisions, the ICC Arbitration could proceed only after a U.S. court intervened in the process by appointing the Indian parties' arbitrator.<sup>161</sup>

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<sup>158</sup> This reflects the ICC Rules of Arbitration, *supra* note 86, art. 6, Appendix I (Statutes of the International Court of Arbitration) ("The work of the Court is of a confidential nature which must be respected by everyone who participates in that work in whatever capacity. The Court lays down the rules regarding the persons who can attend the meetings of the Court and its Committees and who are entitled to have access to the materials submitted to the Court and its Secretariat.").

<sup>159</sup> It is not suggested that there is a clear definition of or distinction between Western and Third World interests. These categories are fluid and contested in the TWAIL literature itself. However, it is suggested in the Dabhol case that the role of major U.S. firms, relevant agencies of the U.S. government, and courts and tribunals in the U.S. and U.K. fit within the TWAIL concept of Western interests; and that the interests of the various constituencies in India that opposed the project, and the Maharashtra government and MSEB after 1995, fit within the concept of Third World interests.

<sup>160</sup> See ICC Arbitration award, *supra* note 2, at 11 & 27-28.

<sup>161</sup> *Id.* at 10-12.

The phenomenon of competing and overlapping litigation is not uncommon in major trade and investment disputes.<sup>162</sup> It reflects how arbitrations may entangle domestic courts in different jurisdictions and how the ability of any court to affect the results of a dispute may depend on the court's degree of control over persons or assets in its jurisdiction and, ultimately, on the support of its government. Judgments of domestic courts or international tribunals will have competing claims to legitimacy based on their perceived fairness, independence, and competence, but based also on the economic and political clout behind a decision or award. At the level of inter-state conflict, then, adjudicative proceedings may warrant further study from TWAIL writers. For example, to what extent do investment contracts and treaties establish a regime in which policy decisions on behalf of Third World interests are subject to review by foreign courts? To what extent do different adjudicative decision-makers provide a balanced forum in which to make such decisions? To what extent do they reflect a colonial or post-colonial relationship between the West and the Third World?<sup>163</sup>

## VI. Conclusion

The TWAIL perspective provided a framework for review of the Dabhol ICC Arbitration. This framework was based on propositions in TWAIL which asserted that international law reflects power relations between Western and Third World interests and is a product of colonialism, that international adjudication may reflect a regime bias against the Third World, and that an important aim of international legal scholarship is to go beyond criticism and attempt to elaborate options for reform.

In the review of the ICC Arbitration, three points were outlined. The first involved the role of the arbitration as a mechanism to review decisions associated with Third World interests. It was argued that the ICC Arbitration was taken beyond the scope of a classical commercial arbitration, pursuant to a discrete contractual relationship, and constituted as a type of governing arrangement. This followed the tribunal's decisions to expand the arbitration beyond the parties to the relevant contract and apply a variety of legal sources besides that contract. By these decisions, the tribunal was able to issue an award against Indian Government actors on the basis that their conduct – especially the decision to cancel the Dabhol project – breached several agreements related to the project as well as domestic and international law.

A second point was that the ICC Arbitration offers reasons to suspect regime bias in international arbitration. The structure and process of the arbitration, on its face, did not indicate a neutral and impartial forum. Further, the content of the award weighed heavily in favour of Bechtel and demonstrated little or no reasoning to justify important conclusions. The award also did not mention highly problematic aspects of the Dabhol project. Notably, the analysis on this point did not address the issue of actual bias on the part of the tribunal; rather, it

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<sup>162</sup> Peter Drahos, *Weaving Webs of Influence: The United States, Free Trade Agreements and Dispute Resolution*, 41(1) J. WORLD TRADE 191 (2007); Marc L. Busch, *Overlapping Institutions, Forum Shopping and Dispute Settlement in International Trade*, 61 INT'L ORG. 735 (2007); Shawn Moen, *Regulation By Procedural Entanglement: The Canadian Wheat Board and International Trade Law*, (2010) (LL.M. Major Research Paper, Osgoode Hall Law School of York University).

<sup>163</sup> Anghie, *supra* note 14.

conveyed how aspects of the arbitration support suspicions of regime bias in international adjudication.

The third point involved the wider conflict between Western and Third World interests. The Dabhol case demonstrated how an array of adjudicative proceedings was triggered in a conflict involving major firms as well as governments in the U.S. and India. In the ICC Arbitration, Western interests including Enron, Bechtel, the International Chamber of Commerce, New York courts, and U.S. government agencies were implicated. Likewise, various constituencies in India that opposed the project and that reflected Third World interests came to be represented by actions of Indian government actors and Indian courts. The wider dispute was resolved only by an overall settlement between U.S. firms and the U.S. and Indian governments, which presumably led to the payment of a substantial sum by India.<sup>164</sup>

This study of the ICC Arbitration indicates that the TWAIL perspective provides a useful framework for critique of international arbitration. It was illustrated based on TWAIL that investment contract arbitration may be used to discipline governments that respond to Third World interests.<sup>165</sup> Arbitrations were initiated in the Dabhol case only after such interests were taken up by government actors. This highlights the critical role of the state in mediating relations and resolving conflicts between foreign investors and Third World interests. However, one may ask whether the ramifications of investment arbitration for democratic choice and regulatory flexibility in the Third World may also apply to governments and constituencies in the West. If so, what would this mean for the distinction in TWAIL between Western and Third World interests?

On the other hand, TWAIL appeared to offer less in terms of alternatives to existing models of international decision-making, including investment arbitration. At a general level, the TWAIL literature calls for alternatives; for example, in elaborating the regime bias approach, Gathii states:<sup>166</sup>

... developing countries should consistently contest outcomes adverse to them, with alternatives that serve their best interests, rather than merely focusing on bias as the inevitable outcome of the origin of the rules in industrial economies or to the lopsided nature of the bargaining power of Third World states relative to developed countries or multinational capital.

The next question, though, is how to develop strategies for states – or the Indian government actors in the Dabhol case – that would allow them to “contest outcomes... with alternative that serve their best interests”. Should the Indian parties have participated in the ICC Arbitration? Should they have refused to settle the dispute? Should they have declined to consent to ICC arbitration clauses in investment contracts? Should they reject investor-state arbitration in investment treaties? Or might it be in the interests of India to maintain a role for some forms of

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<sup>164</sup> The research for this article did not examine how this ultimate outcome of the dispute affected the interests of various actors in the U.S. and India.

<sup>165</sup> See Falk, Stevens & Rajagopal, *supra* note 8, at 4.

<sup>166</sup> Gathii, *supra* note 4, at 262.

arbitration where the terms of a particular contract or treaty are thought to outweigh the costs and risks?

These are not straightforward questions for governments, let alone for TWAIL scholars operating at a normative level. Yet, given the calls for alternatives, one might expect more detailed guidance in TWAIL about whether or not particular avenues for reform would be consistent with Third World interests. For example, how might investment be encouraged, managed, or regulated toward social ends? Should international adjudication be rejected or reformed? Does the TWAIL approach support particular changes to investment contracts or treaties? Along these lines, a modest suggestion is for TWAIL to incorporate inter-disciplinary study of applied and technical topics, such as (in the present case) energy sector regulation or development economics. The strength of the TWAIL approach lies in its normative ambition and diversity. A corresponding weakness is the difficulty to focus intensively on discrete priorities for reform. Thus, the TWAIL perspective draws attention to important flaws in international institutions and prompts reflection about alternatives, but appears to leave the discussion of specific strategies to other fields of law and policy.